No. 49564-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

Robert V. Fernandez

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Mary Sue Wilson
Cause No. 15-1-01423-8

BRIEF OF RESPONDENT

Michael Topping
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did defense counsel provide ineffective assistance when he failed to object to testimony from the victim's mother, or did counsel have strategic reasons for his actions?
2. Did the trial court abuse its discretion by requiring Fernandez to undergo a sexual deviancy evaluation and be found to pose no harm, before he would be allowed in-person contact with his children?
3. Did the trial court abuse its discretion by requiring Fernandez to follow a curfew while under community custody?

B. STATEMENT OF THE CASE

On Sept. 25, 2015, the Appellant, Robert Fernandez hosted a birthday party for his wife at their home in Lacey, WA. RP Vol. I at 88-89. Among those in attendance was his daughter's best friend, thirteen year old L.V.[1] RP Vol. I at 86. Long after the other guests had left, L.V.; Fernandez' daughter; a third friend, Maya; and Fernandez remained in the living room, watching television. RP Vol. I at 94, 96. Eventually, Fernandez' daughter and Maya fell asleep on the floor, though L.V. and Fernandez laid on the couch. RP Vol. I at 100.

According to L.V., at some point, Fernandez began touching her inner thigh; placed a blanket over her lap; pulled down her pants and

[1] L.V. and Fernandez' daughter met at a dance studio at age six, and became fast friends. RP Vol. I at 87. In the ensuing years, their parents followed suit, becoming close friends as well. RP Vol. I at 88. Together the families took several trips together and were close enough that L.V. was considered a second daughter, as evidenced by the shirt she was wearing the night of the party, which designated her as "Daughter #2." RP Vol. I at 90.

underwear; touched her vagina; and finally put his head under the covers, making oral contact with her privates. RP Vol. I at 104-10. L.V. testified that at first, she didn't know how to react, but once Fernandez put his head under the blanket, she got up. RP Vol. I at 106, 111. She then woke up her mother,[2] who was also spending the night at Fernandez' home, and told her what had occurred. RP Vol. I at 125-26. As L.V. was relaying the events to her mother, Fernandez repeatedly apologizing and asked them not to tell his wife. RP Vol. I at 112; Vol. II at 93-94.

Following the incident, Fernandez messaged L.V.'s father, apologizing and stating that he deserved to die. RP Vol. II at 157. Shortly thereafter, Fernandez was taken into custody, and in an interview with Detective Al Stanford of the Lacey PD, Fernandez admitted that he had removed L.V.'s pants, but claimed he couldn't remember any other details. RP Vol. II at 195-99. When pressed further, he stated that L.V. was a good girl, and if she said it happened, then it probably happened.[3] RP Vol. III at 207. Finally, while in custody, Fernandez called his wife,

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[2] Before waking up her mother, L.V. first called her older sister. RP Vol. I at 115-16. When her sister did not answer, she called her father, who told L.V. to wake up her mother. RP Vol. I at 116-17. L.V.'s mother had attended the party and was sleeping in one of the bedrooms. RP Vol. I at 117.

[3] Fernandez' statement to Det. Stanford contained a number of additional incriminating statements such as "I'm the one who did it," "I know [L.V.] can't trust me anymore," and "I'm going to hell for this." RP Vol III at 208-13.

and in the course of their conversation, he admitted that "it happened." RP Vol. III at 247. Based on these facts, Fernandez was convicted of child molestation in the second degree. CP 125.

At sentencing, the court imposed a 17.5 month sentence, and 36 months of community supervision. CP 129. In addition, the court barred Fernandez from consuming alcohol, and required him to adhere to a curfew; undergo counseling; register as a sex offender; and forego contact with minors, including his own children. CP 130, 137. Fernandez now appeals both his conviction and his sentence.

C. ARGUMENT

1. Defense Counsel Did Not Provide Ineffective Assistance When He Failed To Object To Testimony of L.V.'s Mother, Because He Had Strategic Reasons For Not Objecting, And The Failure To Object Did Not Impact The Outcome Of The Trial.

In his first point of error, Fernandez argues that defense counsel should have objected to testimony from L.V.'s mother as inadmissible hearsay, and his failure to do so constituted ineffective assistance of counsel. Appellant's Brief at 7. The testimony in question concerned a conversation between L.V., her mother, and Fernandez' wife, occurring directly after the molestation, with L.V.'s mother testifying that L.V. told her that Fernandez had pulled down her clothes and touched her private

parts. RP Vol. II at 97. This testimony was admitted under the hearsay exception for excited utterances. RP Vol. I at 25.

To prevail on an ineffective assistance of counsel claim, Fernandez has the burden of proving (1) deficient performance by counsel and (2) resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To determine if defense counsel's performance was deficient, the question is whether his actions fell "below an objective standard of reasonableness," viewed at the time of the L.V.'s mother's testimony. *Strickland*, 466 U.S. at 688-89 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."); *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). The presumption is that Fernandez' defense counsel provided effective assistance, unless there is no possible tactical explanation for his actions. *Strickland*, 466 U.S. at 689; *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Finally, to establish prejudice, Fernandez must show that there is a reasonable probability that, but for defense counsel's failure to object, Fernandez would have been found innocent. *Strickland*, 466

U.S. at 694. For the reasons discussed below, Fernandez' claim fails both prongs of *Strickland*, and as a result, must be denied.

a. *There are several strategic reasons why defense counsel may have declined to object to the disputed testimony, therefore Fernandez' claim fails the first prong of the Strickland test, and must be denied.*

It is presumed that defense counsel provided effective assistance, unless there is no possible tactical explanation. *Id.* at 689. In the present case, there is clearly a tactical reason for why defense counsel did not object; namely that defense counsel intended to call his own witness to testify as to what L.V. said following the alleged molestation. At trial, defense counsel called Fernandez' wife, who testified that following the incident, L.V. said that her pants were at her ankles, but did not mention being touched. RP Vol. IV at 406. Knowing that he intended to call Fernandez' wife to testify about L.V.'s statements, it would not be logical for defense counsel to attempt to exclude similar testimony from L.V.'s mother.

Furthermore, the disputed testimony from L.V.'s mother was not hearsay because it was not offered to prove the truth of the matter asserted;[4] specifically, it wasn't offered to prove that L.V. was molested. *Williams v. Illinois*, 567 U.S. 50, 57 (2012) (holding that the confrontation clause does not bar statements not made for the truth of the matter asserted). Instead, the mother's disputed testimony was primarily offered to confirm that L.V. had shared the details of the assault with L.V.'s mother and Fernandez' wife; an issue that defense counsel was planning on disputing. Prior to her mother's testimony, L.V. herself had testified that she shared details of the molestation with her mother and Fernandez' wife. RP Vol I at 125-26. Defense counsel was planning on calling Fernandez' wife to testify that such a conversation never happened. RP Vol IV at 406. Thus, because whether the conversation occurred was at issue, rather than the truthfulness of L.V.'s statements; L.V.'s mother was free to testify that the conversation occurred without running afoul of the

[4] In addition, the testimony arguably fell within the excited utterance exception. ER 803(a)(2). However, because defense counsel waived any objection, the trial court did not fully investigate whether such an exception was applicable. There is testimony which indicates that L.V. was frightened, RP Vol. II at 98, and the conversation took place shortly after a highly traumatic event. Nevertheless, it is not necessary to delve into this question, as other arguments are capable of resolving this issue.

hearsay doctrine.[5] *Anderson v. United States*, 417 U.S. 211, 220 (1974) (holding that testimony was admissible because it was offered merely to prove that statements were made by a third party, not that they were actually true).

Finally, even had L.V.'s mother's testimony been excluded as impermissible hearsay, it would have been admissible to rebut the testimony of Fernandez' wife, as the mother's testimony directly contradicted Fernandez' wife's claim that L.V. did not mention touching. *State v. Fitzgerald*, 39 Wn. App. 652, 662, 694 P.2d 1117 (1985) ("Rebuttal evidence is admissible if not cumulative, and it answers new points raised by the defense."). Therefore, the only real consequence of defense counsel's failure to object is perhaps a slight alteration in the order which testimony occurred, and defense counsel may have had strategic reasons for not upsetting that order.

In conclusion, there are a number of potential strategic reasons why defense counsel did not object to the disputed testimony. Vigorously contesting the testimony would have harmed Fernandez' own defense, and

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[5] It should be noted that the hearsay doctrine exists to ensure defendants have an opportunity to confront their accusers. Here, defense counsel already cross-examined L.V. over the statements she claimed to have made to her mother.

ultimately, would not have been successful. Accordingly, Fernandez' claim fails the first prong of *Strickland*, and must be denied.

b. *Even had L.V.'s mother never testified, the disputed testimony merely repeated testimony already provided by L.V., and overall, the evidence against Fernandez was overwhelming. Consequently, defense counsel's actions cannot be said to have altered the outcome of the trial, thus Fernandez cannot be said to have been prejudiced, as required under Strickland.*

Because there is no indication that the outcome would have been any different even if defense counsel raised an objection, the second prong of *Strickland* is not met, and Fernandez' claim of ineffective assistance must be denied. *Strickland*, 466 U.S. at 694. Prior to the disputed testimony by L.V.'s mother, L.V. had already testified that she told her mother that Fernandez touched her private parts. RP Vol. I at 125-26. Thus, even had L.V.'s mother not taken the stand, the jury would have heard the disputed information.

Beyond the testimony of L.V.'s mother, the jury was provided with substantial evidence of Fernandez' guilt. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 700, 101 P.3d 1 (2004) (holding there was no prejudice from ineffective assistance due to the overwhelming evidence of guilt). From L.V.'s testimony to Fernandez' recorded telephone conversation with his wife, Fernandez' text messages to L.V.'s father, and Fernandez' statement to Detective Stanford, it is clear that a reasonable jury would

have convicted Fernandez, regardless of the alleged deficiency of counsel. RP Vol. I at 104-10; Vol. II at 157, 195-200; Vol. III at 208-13, 247.

Consequently, absent an indication that the outcome would have been different but for counsel's performance, Fernandez' first claim must be denied.

2. The Trial Court Was Within Its Discretion To Put A Hold On In-Person Contact Between Fernandez And His Children Until Fernandez Had Completed A Sexual Deviancy Evaluation, And Been Found Not To Pose A Danger.

At his sentencing hearing, the trial court issued a ruling allowing Fernandez to have contact with his two children by phone, email and video communication, but because Fernandez had not yet submitted to a sexual deviancy treatment evaluation, any in-person contact was prohibited until he gained approval from a treatment provider. RP Sentencing Hearing at 34-36. Fernandez now challenges that prohibition on in-person contact in his second claim of error. Appellant's Brief at 11.

While the right to a parent-child relationship is a fundamental right, which can only be interfered with if reasonably necessary to accomplish needs of the State or public, here there are facts which warrant caution, at least until Fernandez has been evaluated and approved by deviancy treatment professionals. *State v. Torres*, 198 Wn. App. 685, (2017). Fernandez was convicted of molesting a girl nearly the same age

as his own daughter, RP Vol. I at 96, thus his daughter potentially falls within the same class as his victim. *State v. Riles*, 135 Wn.2d 326, 350, 957 P.2d 655 (1998)(noting that under RCW 9.94A.120(9)(c), courts have the authority to prohibit contact with a specified class of individuals bearing some relationship to the crime). The molestation was committed mere feet from his sleeping daughter, demonstrating a willingness to potentially expose his children to grossly inappropriate behavior.

Furthermore, while Fernandez has argued that there is no evidence to show his own children are in danger, the record establishes that the victim was in many respects, like a surrogate daughter to him. *State v. Corbett*, 158 Wn. App. 576, 599-601, 242 P.3d 52 (2010)(upholding a prohibition on the defendant seeing his biological children because he had used his parental role with other children to sexually abuse them). For example, the victim was Fernandez' daughter's best friend for six years; they had taken a number of family vacations together; Fernandez referred to the victim as "like [his] daughter;" and at the time of the molestation, the victim was even wearing a shirt that said Daughter #2. RP Vol. I at 87-90; Vol. III at 212. If Fernandez was willing to assault a surrogate daughter, there are reasonable grounds to believe his own children could be at risk.

In light of these facts, it cannot be said with certainty that Fernandez' children are safe in his presence or that the trial court's decision was manifestly unreasonable. *Corbett*, 158 Wn. App. at 597 ("We review crime related prohibitions for an abuse of discretion. Abuse of discretion occurs when a decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons."). To the contrary, it seems apparent that were the trial court to allow Fernandez access to his children prior to evaluation by sexual deviancy treatment provider, the State would be in dereliction of its duty to prevent harm to children. *Id.* at 598 (noting that the State has a compelling interest in preventing harm and protecting children). Accordingly, the trial court did not abuse its discretion by barring contact pending approval from medical professionals, and Fernandez' second claim must be denied.

3. The Trial Court Was Within Its Discretion to Impose Curfew Requirements On Fernandez.

In his third and final point of error, Fernandez argues that his due process rights were violated when the trial court imposed a curfew restriction on his community custody. Appellant's Brief at 14. While the trial court did not elaborate on its decision, it held that facts of the case warranted a curfew. RP Sentencing Hearing at 34. Such a ruling is reviewed under an abuse of discretion standard, and shall not be

overturned unless the "decision was manifestly unreasonable or exercised for untenable grounds for untenable reasons." *Corbett*, 158 Wn. App. at 597. Because imposing a curfew on an individual convicted of a terrible crime is not manifestly unreasonable, Fernandez' third claim should be denied.

D. CONCLUSION

For these reasons, the State asks that this court deny Fernandez' claims, and affirm his conviction.

Respectfully submitted this 12th day of June, 2017.

Michael Topping, WSBA# 50995
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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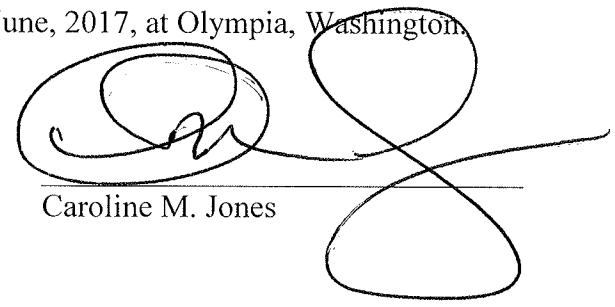
DEREK M. BYRNE
COURT CLERK
COURT OF APPEALS, DIVISION II
950 BROADWAY
TACOMA, WA 98402-4454

and via email

AND TO: Skylar Texas Brett
skylarbrettlawoffice@gmail.com

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 12 day of June, 2017, at Olympia, Washington.



Caroline M. Jones

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

June 12, 2017 - 1:42 PM

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Appellate Court Case Title:	State of Washington, Respondent v. Robert V. Fernandez, Appellant
Superior Court Case Number:	15-1-01423-8

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